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No. 879

In the Supreme Court of the United States

OCTOBER TERM, 1960

G. A. RAFEL & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION NO. 9, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND FRANK BENNER AND ROBERT FITZGERALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals dismissing the petition for review (Pet. 13a) is not reported. The decision of the National Labor Relations Board (Pet. 4a–12a) is reported at 128 NLRB No. 100.

JURISDICTION

The decision of the court of appeals was entered on January 9, 1961 (Pet. 13a). The petition for a writ of certiorari was filed on April 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly concluded that an order of the National Labor Relations Board quashing a notice of hearing under Section 10(k) of the National Labor Relations Act is not a final order under Section 10(f) of the Act and is therefore not reviewable by the court of appeals.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A to the petition (Pet. 1a–3a).

STATEMENT

On April 24, and December 2, 1959, G. A. Rafel & Co., Inc., filed charges with the Regional Director of the Board alleging that Local 9, International Brotherhood of Electrical Workers had violated Section 8(b)(4)(D) of the Act by inducing work stoppages in furtherance of a jurisdictional dispute with another labor organization, Local 134, IBEW (Pet. 4a-5a). Following investigation of the charge filed on April 24, the Regional Director issued a notice of hearing with respect to the underlying dispute in accordance with the procedure prescribed by Section 10(k) of the Act. The second charge was filed during the pendency of the hearing, and, following its investigation, the Regional Director consolidated the two cases for hearing. Hearings were held under Section 10(k) between July 6, 1959, and January 13, 1960 (*ibid.*).

The evidence disclosed that since 1946 the Company was engaged in "inside" electrical work, and, although not a party to any collective agreement, customarily employed members of Local 134 for this work. In late 1957 or early 1958 the Company secured contracts to perform "outside" electrical work. Local 9 claimed jurisdiction over "outside" work in the area, while Local 134 claimed jurisdiction over "inside" work. In April 1958, after the Company began its first "outside" job, the two locals discussed their jurisdictional claims with Company officials, and all parties agreed that the work "belonged to" Local 9 (Pet. 7a–8a).

Beginning about May 1958, the Company made frequent requests to Local 9 to supply workers to perform the "outside" work, but Local 9 refused to do so. Because of this refusal, the Company continued to employ workmen who were members of IBEW locals other than Local 9, but consistently told Local 9 that it would replace its present employees with members of Local 9 if they were referred for employment. Local 9's agents, Frank Benner and Robert Fitzgerald, appeared at the Company's "outside" job sites where they requested employees to show their union membership cards, informed employees that they were working within Local 9's jurisdiction, and recommended that they leave the jurisdiction in order to avoid serious difficulties with the union. In addition, Benner and Fitzgerald communicated with various locals throughout the country and requested their assistance in getting their mem-

bers to leave the Company's employ (Pet. 8a–10a).

On August 24, 1960, the Board issued its decision. It noted that, "[b]efore the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated" (Pet. 10a). Finding that the evidence adduced at the hearing established that "the dispute in this case is not over the assignment of work within the meaning of Section 8(b)(4)(D)," the Board concluded that the present case did not present "a dispute within the meaning of Section 10(k)" (Pet. 11a). Accordingly, the Board quashed the notices of hearing issued under Section 10(k).

Petitioner thereupon sought to obtain review in the court of appeals of the Board's order quashing the notices of hearing. The court dismissed the petition for review on the ground that it had no jurisdiction, since the Board's order was not a "final order" within the meaning of the Act (Pet. 13a).

ARGUMENT

1. Section 10(f) of the Act provides that any "person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order" in the appropriate court of appeals. The question presented is whether a Board determination, quashing a notice of hearing under Section 10(k) of the Act, is "a final order of the Board" within the meaning of Section 10(f). This narrow question of statutory interpretation has arisen only once before in the over

thirteen years that Section 10(k) has been in the Act. In that instance, another court of appeals reached the same conclusion as did the court below, *i.e.*, that the quashing of a Section 10(k) notice of hearing is not a "final order." *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F. 2d 320 (C.A. 10). See also *Herzog* v. *Parsons*, 181 F. 2d 781 (C.A. D.C.), certiorari denied, 340 U.S. 810. We therefore submit that the issue is not appropriate for review by this Court.

The Board, with court approval, has consistently taken the position that the term "final order," as used in Section 10(f), refers to "an order as the culmination of the [unfair labor practice] procedure described in Section 10 (b) and (c) of the Act, as amended." *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C.A. 1). This conclusion is supported by the language and structure of the Act. Section 10(e), the companion to Section 10(f), empowers the Board to petition for enforcement of "such order," and, looking back to Section 10(c), where the term "order" is first used, it would seem to follow that "such order" means the order there described—*i.e.*, one issued at the conclusion of a formal unfair labor practice proceeding. Accordingly, attempts to obtain review in the courts of appeals of action short of a final unfair labor practice order—such as a Board representation determination under Section 9, or the General Counsel's refusal to issue a complaint based on an unfair labor practice charge—have uniformly failed. The cases cited by petitioner,

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[1] *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *National Labor Relations Board* v. *Electrical Workers*, 308 U.S. 413; *Lincourt* v. *National Labor Rela-*

permitting review of the dismissal of an unfair labor practice complaint (Pet. 9–10), are not to the contrary. In those cases, the Board dismissed the complaint after holding a formal unfair labor practice hearing, and thus its action represented a final disposition of the unfair labor practice case under Section 10 (b) and (c) no less than if an affirmative remedy had been granted.

The quashing of a notice of hearing in a Section 10(k) proceeding does not meet the above test of a "final order." As was recognized in *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573, Section 10(k) is not part of the normal unfair labor practice machinery, but is instead a special procedure for obviating unfair labor practice sanctions through settlement of the underlying jurisdictional dispute. By virtue of Section 10(k), a complaint does not immediately issue upon a Section 8(b)(4)(D) charge which appears to have merit; further proceedings on the charge are tolled while the parties are afforded an opportunity to adjust the underlying jurisdictional dispute, to agree upon methods of adjustment, or to have the Board make a determination respecting the dispute. If the Board, after noticing the dispute for hearing under Section 10(k), finds that it has been settled or that the dispute did not in fact give rise to

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tions Board, 170 F. 2d 306 (C.A. 1); *General Drivers* v. *National Labor Relations Board*, 179 F. 2d 492 (C.A. 10); *Thompson Products* v. *National Labor Relations Board*, 133 F. 2d 637 (C.A. 6); *Laundry Workers, Local 221* v. *National Labor Relations Board*, 197 F. 2d 701 (C.A. 5).

a jurisdictional strike within the meaning of Section 8(b)(4)(D), it quashes the notice of hearing and the unfair labor practice charge is dismissed. Similarly, if the Board proceeds to determine the dispute under Section 10(k) and the parties comply with the determination, the unfair labor practice charge is dismissed. In both of these situations, the dismissal of the charge precludes the unfair labor practice case from reaching the stage of formal prosecution—and thus there is no final unfair labor practice order culminating proceedings under Section 10 (b) and (c). Only if, unlike here, the Section 10(k) procedure results in a Board determination of "the dispute out of which such unfair labor practice shall have arisen" and there is a refusal to comply with the determination, does the unfair labor practice case proceed to complaint and ultimate Board decision and order.

Contrary to petitioner's contention (Pet. 5–6), nothing in the legislative history of Section 10(k) compels the conclusion that an order quashing a notice of hearing under that provision satisfies the requirements of Section 10(f). As shown, both the language and purpose of Section 10(k) indicate that it was intended to serve a separate and preliminary purpose respecting jurisdictional disputes before the unfair labor practice provisions of the Act come into play. Moreover, when it added Section 10(k) to the Act, Congress did not, by amending the review provisions of Section 10 (e) and (f) or otherwise, indicate that it intended to expand the special and limited meaning which the term "final order" used in

those subsections had previously acquired. Indeed, Congress specifically rejected a proposal which would have achieved this result in a comparable situation by permitting Section 9 representation determinations to be reviewed under Section 10 (e) and (f). See Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 334, 560–561.[3]

2. If the Board's determination is reviewable, nevertheless the Board properly quashed the notice of hearing in this case. Before the Board may proceed to a Section 10(k) determination it must have reasonable cause to believe that Section 8(b)(4)(D) has been violated. The evidence here (see *supra*, pp. 3–4) shows that both the Company and Local 134 agreed with Local 9 that "outside" electrical work belonged to Local 9, and that the Company at all times desired to employ Local 9 men. But Local 9 persistently refused to refer men to the Company (Pet. 11a). In these circumstances, the Board could well conclude, as it did, that there was no dispute over the assignment of work within the meaning of Section 8(b)(4)(D), and thus no statutory justification for proceeding to a Section 10(k) determination. This result is not in conflict with *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union, supra.* There,

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[3] Petitioner relies (Pet. 6) on a footnote in *Juneau Spruce Corp.*, 82 NLRB 650, 656, note 6:

> H.R. 302, as reported, provided for the appointment by the Board of an arbitrator * * *. The award of the arbitrator was to have been deemed the final order of the Board. * * * In conference, the section was amended by deleting the provision for the appointment of an arbitrator. * * *

unlike in the present case, it was clear that the conduct giving rise to the dispute was within Section 8(b)(4)(D) (364 U.S. at 576). The Court held that, in such a situation, the Board was required to go on and make an affirmative determination of the underlying dispute. Where the circumstances do not come within Section 8(b)(4)(D) obviously the Board has no duty, and in fact no power, to make any determination of the dispute.

The Conference Committee, it seems evident, gave that authority directly to the Board.

It is clear, however, from this quotation itself, and from the portions of the footnote omitted in the quotation that the authority which the conference committee gave the Board was the power to arbitrate the underlying dispute. See *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union*, *supra*, 364 U.S. at 581–582. There is no indication in *Juneau Spruce* or in the committee reports that the conference committee intended to make the Board's Section 10(k) determination final in the sense of allowing review in the court of appeals. In fact, the elimination of the explicit finality provision from the bill in conference may point the other way. The question involved in *Juneau Spruce* was not the reviewability issue, but merely whether the Board had the power, when an 8(b)(4)(D) charge was filed, to issue a complaint under Section 10(b) instead of first hearing and determining the dispute under Section 10(k).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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